pretext for illegal discrimination. Petitioner further contends that HUD and DHR failed to ensure that the investigation of her fair housing complaint was complete and adequate prior to issuing a no probable cause determination and closing the complaint.

II. PROCEEDINGS BELOW

A. The District Court

On November 14, 2003, petitioner filed a Complaint in the Northern District of Georgia against respondent, DHR, and HUD. The Complaint alleged violations of petitioner's civil and constitutional rights. Respondent and HUD filed motions to dismiss. On June 10, 2004, the district court granted HUD's motion to dismiss and dismissed all of petitioner's claims against the respondent except her claim under the FHA. On September 29, 2004, the district court granted petitioner's motion for entry of default against DHR for failure to answer or otherwise respond to the complaint. After discovery period, petitioner filed a motion for summary judgment against DHR and partial summary judgment against respondent. Respondent also moved for summary judgment.

On May 23, 2005, the district court granted the respondent's motion for summary judgment; denied petitioner's motion for summary judgment and partial summary judgment; and dismissed the action as to all defendants. The district court dismissed petitioner's claims against respondent under the FHA for: (1) failure to establish a prima facie case of discrimination, and (2) failure at the pretext stage of the *McDonnell Douglas* analysis. (App. at 12a-13a) The district court dismissed petitioner's related claim against DHR in light of the dismissal against the respondent. On June 21, 2005, petitioner filed a timely notice of appeal with the district court.

B. The Court of Appeals

On December 21, 2005, the United States Court of Appeal for the Eleventh Circuit affirmed the district court's granting of summary judgment in favor of respondent, stating that: (1) petitioner failed to establish a prima facie case of discrimination because she did not demonstrate that similarly situated applicants were treated differently, and (2) petitioner failed to make out a prima facie case of discrimination or show that the respondent's legitimate non-discriminatory reason was pretexual. (App. at 5a-6a)

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Review should be granted for three reasons: First, there is conflict among lower courts regarding the applicability of the fourth element of the *McDonnell Douglas* analysis to lending discrimination cases under the FHA. Second, the decision below conflicts with several decisions of this Court and departs from accepted legal standards for evaluating petitioner's claims. Third, this case is of national importance because it demonstrates a need for specific case law and uniform guidance in the area of lending discrimination.

I. THERE IS CONFLICT AMONG LOWER COURTS

McDonnell Douglas sets forth a four-prong analysis for establishing a prima facie case of discrimination in an employment context. Some lower courts, including the eleventh circuit have adapted the *McDonnell Douglas* analysis in the context of lending and real estate sales. See *Noland v. Commerce Mortgage Corp.*, 122 F.3d 551, 553 (8th Cir. 1997), *Latimore v. Citibank, F.S.B.*, 979 F. Supp. 662, 665 (N.D. Ill. 1997), aff'd, 151 F. 3d 712, 715 (7th Cir. 1998); *Thomas v. Fed. Sav. Bank*, 653 F. Supp. 1330, 1338 (N.D. Ind. 1987); *Gross v. United States Small Bus. Admin.*,

669 Supp. 50, 52-53 (N.D.N.Y. 1987); *Bell v. Mike Ford Realty Co.*, 857 F.Supp. 1550, 1556 (S.D. Ala. 1994); *Hickson v. Home Federal*, 805 F.Supp.1567 (N.D. Ga.1992); *Cooley v. Sterling Bank*, 280 F. Supp.2d 1331, 1339 (M.D. Ala 2003). See *Recent Developments in Lending Discrimination*, Gary C. Tepper and Samuel K. Charnoff (2000 Arent Fox) (findlaw.com)

However, there is conflict among courts regarding the fourth element of this analysis for establishing a prima facie case in lending discrimination, particularly where the lender continues to make loans to qualified applicants and the plaintiff is in fact qualified. The problem with this element is that it can be generally subsumed under the second element, assuming that the lender continues to make loans to qualified applicants and the plaintiff is in fact qualified. Two decisions from Ohio omit the fourth part of the test entirely. See *Steptoe v. Sav. Of America*, 800 F. Supp. 1542 (N.D. Ohio 1992); *Old West End Ass'n v. Buckeye Fed. Sav. & Loan*, 675 F. Supp. 1100 (N.D. Ohio 1987). Id.

Due to the problem with this fourth element, the Seventh Circuit has generally disapproved of its use in certain situations as expounded in *Latimore v. Citibank*. This Seventh Circuit also pointed out the unsuitability of the *McDonnell Douglas* framework when there is no basis for comparing the defendant's treatment of the plaintiff with the defendant's treatment of other similarly situated persons when the plaintiff met the bank's criteria of creditworthiness. The D.C. Circuit's decision in *Crawford v. Signet Bank*, Nol.98-7105 (June 25, 1999) skirts the issue of whether *McDonnell Douglas* is applicable to cases of lending discrimination because the plaintiffs failed to meet the second prong of the analysis. Id.

HUD's Chief Administrative Law Judge, Alan W. Heifetz, articulated the burden of proof framework under *McDonnell*

Douglass to be applied in housing discrimination cases brought under the FHA in *Secretary, HUD On Behalf of Heron v. Blackwell*, 908 F.2d 864, No. 90-8061 (11th Cir. Aug. 9, 1990). While the Eleventh Circuit has upheld this statement of law, it declined to adopt the fourth element of the framework in requiring plaintiffs to establish a prima facie case of disparate treatment (employment) in the case, *Hill v. Metropolitan Atlanta Rapid Transit Authority*, 841 F.2d 1533 (11th Cir.1988). Additionally, the Eleventh Circuit has recognized that the "elements of a prima facie case are flexible and should be tailored, on a case-by-case basis, to differing factual circumstances." See *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1123 (11th Cir. 1993).

Petitioner contends that the lower courts did not tailor the elements in the instant case and relied on inappropriate and harsh standards of proof for requiring her to establish a prima facie case of racial discrimination. Thus, the conflict among court rulings in different circuits, including the inconsistent application of the required proof elements in the Eleventh Circuit, is the first reason why certiorari should be granted.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

This Court developed a three-step procedure to allocate the burden of producing proof of racially discriminatory treatment in the employment setting under the *McDonnell Douglas* framework. This format is designed to assure that the "plaintiff [has] his day in court despite the unavailability of direct evidence." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1984). First, the plaintiff must establish by a preponderance of the evidence, a *prima facie* case of discrimination based on four elements, which this Court stated are "not fixed," rather, they depend on the circumstances of each case. *Id* at 802. This Court stated that

the burden of establishing a *prima facie* case, however, is not onerous. *Burdine, supra,* 450 U.S. 253, 101 S.Ct. at 1093-94. A showing that other applicants were considered for the job after plaintiff suffices to show circumstances giving rise to an inference of discrimination. *McDonnell Douglas*, supra, 411 U.S. at 802, 93 S.Ct. at 1824.

In the instant case, the lower courts ruled that petitioner failed to establish a prima facie case with respect to the fourth element of this framework because she did not demonstrate that similarly situated comparators were "nearly identical" to petitioner. (App. at 3a, 12a). However, unlike in the employment context, where job applicants compete for a position, petitioner is not competing with another loan applicant for a loan.

Thus, applying the Court's analysis for establishing a prima facie case of discrimination to the case before this Court, petitioner showed that respondent continued to approve loans for non-minority applicants with qualifications similar to those of petitioner, and that the loan applicant properties were located in non-minority areas or neighborhoods. Yet, in its decision, the court of appeals erroneously analyzed the comparator loan applicant data provided and failed to consider the racial composition of the neighborhood or areas of the comparator loan properties. (App. at 5a) The lower courts also used case law in the credit discrimination context for determining that petitioner did not demonstrate that similarly situated applicants were treated differently even though petitioner's creditworthiness was not an issue. *Cooley v. Sterling Bank* at 134.

The court of appeals stated in its decision: "Even if we were to assume that Boykin established a prima facie case, the Bank proffered a legitimate nondiscriminatory reason for its decision, and Boykin has not demonstrated that the reason was merely a pretext for discrimination." (App. at 5a-6a)

This brings us to the next stage of the burden-shifting framework as set forth in *McDonnell Douglas*, 411 at 792, wherein the burden of production is placed upon the defendant to articulate a legitimate non-discriminatory reason for its adverse action. *Burdine*, 450 at 254.

Respondent stated it rejected petitioner's loan application because it determined that the loan was "high cost" under New York law. Petitioner's evidence clearly established that respondent's approval of the loan was based on respondent's setting of the loan amount, interest rate and other closing costs for the subject property. Accordingly, respondents knew the property was non-owner occupied and not covered under this law, which only applied to owner-occupied properties. Yet, the court of appeal failed to consider all of the evidence pertaining to this issue in its decision.

At the third and final stage of the *McDonnell Douglas* burden-shifting framework, once the defendant satisfies its burden of production, the plaintiff then has the burden of persuading the court that the proffered reason for the defendant's action is a pretext for discrimination. *Burdine*, 450 U.S. at 256. The plaintiff maintains the burden to demonstrate that an asserted reason, even though pretextual, evidences intent to discriminate. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

Petitioner contends that respondent did not meet its burden of articulating a legitimate, nondiscriminatory reason for denying petitioner's loan application because it was not a "lawful" reason, as it did not apply in the instant case. This Court stated that once the defendant satisfies the burden of articulation, any presumption of discrimination "drops out of the picture," *St Mary's Honor Center*, 113 S. Ct. at 2749, citing Burdine, 450 U.S. at 255, and the burden shifts back to the plaintiff. The lower court's decision conflicts with this Court's decision because the respondent failed to meet its

burden and rebut the presumption of discrimination by producing evidence that petitioner, in the instant case, was rejected, and similarly situated applicants were granted loans for legitimate nondiscriminatory reasons.

Assuming that the *McDonnell Douglass* framework is applicable, petitioner made out a prima facie case, and the lower court's conclusion that respondent's proffered reason for denying petitioner's loan application is legitimate, petitioner clearly demonstrated to the lower court, that this reason is pretext, unworthy of credence, and could not be the real reason for her loan denial. A plaintiff's prima facie case, combined with sufficient evidence to find that the defendant's asserted justification is false, may permit the trier of fact to conclude that the defendant unlawfully discriminated against the plaintiff. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000)

Additionally, in his concurring opinion in the above case, which petitioner contends is appropriate to the instant case, Justice Ginsberg states:

> The Court today holds that an employment discrimination plaintiff may survive judgment as a matter of law by submitting two categories of evidence: first, evidence establishing a "prima facie case," as that term is used in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); and second, evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false. Because the Court of Appeals in this case plainly, and erroneously, required the plaintiff to offer some evidence beyond those two categories, no broader holding is necessary to support reversal."

Roger *Reeves Petitioner v. Sanderson Plumbing Products, Inc.*, on writ of *certiorari to the united states court of appeals for the fifth circuit* (June 12, 2000)

In light of all of the above Supreme Court decisions, the second reason certiorari should be granted is to address the apparent conflict between these decisions and the lower court's decision, which clearly failed to evaluate all of the evidence petitioner presented to support her discrimination claims according to this Court's established legal standards.

III. THIS CASE PRESENTS ISSUES OF NATONAL IMPORTANCE

Petitioner was unable to locate any Supreme Court or Administrative Law Judge decisions under the FHA where the complainant or plaintiff was similarly situated to petitioner. If petitioner's research is correct, there is a need for precedent setting case law to address the important issues raised in this case.

Moreover, it is particularly important to have uniform legal standards and guidance for all federal courts, HUD Offices, and HUD certified fair housing agencies nationwide that analyze, investigate, evaluate, or make decisions on FHA lending discrimination cases. Specifically, more continuity is needed in defining terms such as similarly situated, legitimate non-discriminatory business reason, similar qualifications, pretext, etc. See *HUD Handbook 8024.01: Title VIII Complaint Intake, Investigation and Conciliation Handbook*, (September 1995). If such guidance is followed, it should help ensure accurate, fair, and impartial determinations on future cases of any similarly situated person to petitioner who believes she or he was the victim of illegal racial discrimination in lending.

Finally, the questions presented for review in this case appear to be of national importance to the mortgage banking industry, State Attorney General Offices, U.S. Department of Justice, HUD, Office of the Comptroller General and other federal, state, and local offices that are involved in lending or the prevention of unfair lending practices. See *Judge Halts Sptizer Probe of Loan Discrimination by Banks, New York Law Journal*, Mark Hamblett, (October 13, 2005, Findlaw.com.); *U.S. is taking harder look at discrimination in lending*, Kenneth Harney, *The Baltimore Sun*, (April 10, 2005, Lexis Nexis); *Fed Advises Against Jumping to Conclusions on HMDA*, *Nonprime News*, Vol. 14; No. 7, Pg.64, (April, 2005, Lexis Nexis); *HUD Creates National Fair Housing Training Academy to Strengthen Enforcement of Fair Housing Law, Curbs Discrimination*, Michael Fluharty, HUD No. 04-055, (June 18, 2004, www.hud.gov)

Thus, this petition should be granted for the third reason set out above, and the obligation of this Court to promulgate and enforce our nation's fair housing policy.

CONCLUSION

For the foregoing reasons, Yvette Boykin respectfully requests the Court to grant her petition for certiorari.

Respectfully submitted,

Yvette Boykin
Pro Se Petitioner

Dated: March 17th, 2006

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DECEMBER 21, 2005
THOMAS K. KAHN
CLERK

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 05-13494
Non-Argument Calendar

D.C. Docket No. 03-03467-CVMHS-1

YVETTE BOYKIN,

Plaintiff-Appellant

versus

BANK OF AMERICA CORPORATION, d/b/a BANK OF AMERICA and its wholly-owned subsidiary, EQUICREDIT CORPORATION, STATE OF NEW YORK EXECUTIVE DEPARTMENT, DIVISION OF HUMAN RIGHTS, and U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, BANK OF AMERICA, N.A.,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Georgia

(December 21, 2005)

APPENDIX A

Before TJOFLAT, MARCUS and WILSON, Circuit Judges,

PER CURIAM:

The district court granted summary judgment in favor of Bank of America and its wholly-owned subsidiary EquiCredit Corporation (collectively the "Bank") on Yvette Boykin's discrimination claim under the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, et seq. Boykin now appeals, contending the following: (1) the district court applied the wrong prima facie elements in resolving her claim, and (2) to make out her claim, she did not need to show that the Bank continued to approve loans for non-minority applicants with credit qualifications and loan details nearly identical and significantly parallel to hers, because that standard would be impossible to meet; (3) assuming the court used the correct prima facie elements, she provided evidence sufficient to satisfy such elements; and (4) she proved that the Bank's legitimate non-discriminatory reason – that her loan was a "high-cost" loan under New York state law and, as such, was in violation of the Bank's written lending policy – was a pretext for discrimination.[1]

The FHA makes it unlawful for "any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction because of race [.]" 42 U.S.C. § 3605(a). A "residential real estate-related transaction" includes "[t] he making or purchasing of loans"

[1] In determining whether the district court erred in granting summary judgment – because a material issue of fact remains to be litigated – we use the time-honored standard. That is, we consider the evidence in the light most favorable to the non-movant, here Boykin, and give her the benefit of all reasonable inferences that evidence yields.

"for purchasing, constructing, improving, repairing, or maintaining a dwelling[.]" Id. §, 3605(b)(1)(A). In a case such as the instant case, where the plaintiff relies on circumstantial–rather than direct – evidence of discrimination, we use the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed2d 207 (1981), to evaluate the claim of discrimination under the FHA. See Sec'y, U.S. Dep't of Hous. and Urban Dev. v. Blackwell, 908 F.2d 864, 870 (11th Cir.1990).

"[T]he elements of a prima facie case are flexible and should be tailored, on a case-by-case basis, to differing factual circumstances." Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1123 (11th Cir. 1993) (quotation marks omitted). In the credit discrimination context, a plaintiff can establish a prima facie case of discrimination by offering evidence showing: (1) that the plaintiff is a member of a protected class; (2) that the plaintiff applied for and was qualified for a loan from the defendant; (3) that the loan was rejected despite the plaintiff's qualifications; and (4) that the defendant continued to approve loans for applicants outside of the plaintiff's protected class with similar qualifications. See Cooley v. Sterling Bank, No.03-14727, manuscript opp. at 12 (11th Cir. July 16, 2004); see also Rowe v. Union Planters Bank, 289 F.3d 533, 535 (8th Cir. 2002). "In order to meet the comparability requirement a plaintiff is required to show that [she] is similarly situated in all relevant aspects to the non-minority comparator. Silvera v. Orange County Sch. Bd., 244 F.3d 1253, 1259 (11th Cir. 2001) (discussing racial employment discrimination). Comparators must be "nearly identical to prevent courts from second-guessing: reasonable decisions and "confusing apples with oranges." Id. (quotation marks omitted) (discussing the similarity of misconduct needed for a comparator in discrimination claim based on an adverse discipline decision). In the "credit

discrimination context, the Plaintiff must present evidence that [she] was 'similarly situated in all relevant aspects' to the non-minority applicants who received loans from [the lender]. In other words, a comparator's credit qualifications and loan details must be 'nearly identical' to the Plaintiff's in order to prevent this court from second guessing the bank's decision and confusing apples with oranges." Cooley v. Sterling Bank, 280 F.Supp.2d 1331, 1340 (M.D.Ala. 2003) (quotation marks omitted), aff'd, No. 03-14727 (11th Cir. July 16, 2004).

If the plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to provide a "legitimate, nondiscriminatory reason for its actions." Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1432 (11th Cir. 1998). If the defendant satisfies his burden, the plaintiff must establish that the employer's reason was a "pretext to mask unlawful discrimination." Id. In this final step, the plaintiff carries the "ultimate burden of establishing by a preponderance of the evidence that a discriminatory intent motivated the [lender's] action." Perryman v. Johnson Products Co., 698 F.2d 1138, 1142 (11th Cir. 1983). "[T]he plaintiff must then present concrete evidence in the form of specific facts which show that the defendant's proferred reason is mere pretext. Mere conclusory allegations assertions will not suffice." Early v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990). Federal courts do not sit as a court of appeals that reexamines a bank's business decisions. See Chapman v. AI Transport, 229 F.3d 1012, 1030 (11th Cir. 2000) (addressing age discrimination claim).

> A plaintiff is not allowed to recast [a lender's] proffered nondiscriminatory reasons or substitute [her] business judgment for that of the [lender]. Provided that the proffered reason is one that might motivate a reasonable [lender], [a loan applicant] must meet that reason head on and

> rebut it, and the [applicant] cannot succeed by simply quarreling with the wisdom of that reason. Id.
>
> Although " [d]epartures from normal procedures may be suggestive of discrimination," Morrison v. Booth, 763 F.2d 1366, 1374 (11th Cir.1985), "the mere fact that [a bank] failed to follow its own internal procedures does not necessarily suggest that [the bank] was motivated by illegal discriminatory intent[,]" Randle v. City of Aurora, 69 F.3d 441, 454 (10 Cir. 1995).

The district court applied the correct prima facie elements in granting the Bank summary judgment. While the elements of a prima facie case are not rigid and are applied on a case-by-case-basis, requiring the plaintiff to demonstrate that other similarly situated non-minority applicant obtained loans from the defendant provides essential context to the defendant's decisions, and, absent direct evidence of discrimination, there is no basis for a trier of fact to assume that a decision to deny a loan was motivated by discriminatory animus unless the plaintiff makes a showing that a pattern of lending suggests the existence of discrimination. The bank's underwriting guidelines may be more stringent than the guidelines that generally "qualify" and applicant, and the mere denial of an application to a "qualified" minority applicant does not alone raise an inference of discrimination. Thus, one element of the prima facie case must be that the lender continued to approve loans to similarly situated non-minority applicants.

Boykin failed to establish a prima facie case of discrimination because she did not demonstrate that similarly situated applicants were treated differently. Boykin's evidence of similarly situated applicants included three white applicants whose loans were approved for property within

the same geographic area as her property. However, the evidence provided no details regarding the relevant financial status of the applicants and showed that (1) two of the applicants applied for first mortgages, not refinancings, and (2) one of the applicants applied with a co-applicant. These comparators are not "nearly identical" to Boykin, as nothing is known about their relevant financial backgrounds or the costs or amounts of their loans. No other evidence in the record reveals any similarly situated applicants.

Even if we were to assume that Boykin established a prima facie case, the Bank proffered a legitimate nondiscriminatory reason for its decision, and Boykin has not demonstrated that the reason was merely a pretext for discrimination. The Bank denied Boykin's loan because it determined that the loan was " high-cost" under New York law and would be in violation of its written policy against such loans. Boykin contends that the reason was pretextual because (1) the " high-cost" regulations did not apply to her property because it was not owner-occupied, and (2) the Bank failed to follow its internal procedures regarding "high-cost" determinations early in the application process. These arguments are unavailing: (1) we do not reexamine the Bank's business decisions, and, because the "high-cost" loan decision was one that would motivate a reasonable lender, Boykin cannot simply context the wisdom of the decision, and (2) the Banks failure to follow internal procedures alone is not evidence of pretext. Therefore, because Boykin failed to make out a prima facie case of discrimination or show that the Bank's legitimate non-discriminatory reason was pretextual, the district court committed no error in granting the Bank summary judgment.

AFFIRMED

FILED IN CLERK'S OFFICE
U.S.D.C. Atlanta
MAY 23 2005
LUTHER THOMAS, Clerk
By: s/___ Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

YVETTE BOYKIN, :

Plaintiff, : CIVIL ACTION NO.

v. : 1: 03-CV-3467-MHS

BANK OF AMERICA, N.A., et al.,

Defendants. :

ORDER

Presently before the Court are the parties' cross-motions for summary judgment. For the following reasons, the Court grants defendant's motion, denies plaintiff's motion, and dismisses this action.

Background

On November 14, 2003, plaintiff, an African-American female who is proceeding pro se, filed this action pursuant to various federal statutes, regulations, and constitutional provision. Plaintiff claims that defendant Bank of America, N.A., and Equicredit Corporation of America (collectively, the "Bank") denied plaintiff's loan refinancing application on the basis of her race, gender, and age and the property's location in a predominantly African-American neighborhood.

On June 29, 2001, plaintiff applied for the loan over the telephone by calling Equicredit's headquarters in Jacksonville, Florida.[1] She sought the loan to refinance a home in Buffalo, New York. Equicredit informed plaintiff over the telephone that her credit rating was sufficient to qualify for a loan but that she would need to send further documentation to receive final approval. Plaintiff did not disclose her race or the racial makeup of the neighborhood where the property was located to Equicredit. Plaintiff mailed the requested documentation to Equicredit. None of this information revealed plaintiff's race, sex, or the racial demographics of the area surrounding the property.

On July 25, 2001, Equicredit contacted plaintiff by telephone and informed her that it had denied her loan application based upon its determination that the loan would be "high cost" under New York law.[2] In August of 2001, plaintiff received written confirmation of the denial of her loan and Equicredit's determination that the loan would be "high cost" as the reason for denial.

On August 8, 2001, plaintiff filed a complaint against defendant Bank with defendant United States Department of Housing and Urban Development (HUD). HUD referred the complaint to defendant State of New York Executive Department, Division of Human Rights (DHR). DHR determined that there was not probable cause to support plaintiff's allegations and that the investigation did not

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[1] Plaintiff submitted her loan application to Equicredit Corporation of America, a wholly owned subsidiary of Bank of America, N.A.

[2] At the time of plaintiff's loan application in June of 2001, Equicredit had a written credit policy that it would not make a loan which was considered "high cost " under New York law. A "high cost " loan is one where the closing costs for the loan exceed five percent (5%) of the loan amount. Plaintiff applied for a loan in the amount of $28,000.00. The estimated closing costs were $1,784.50, or 6.4% of the loan amount.

reveal any evidence of discrimination. DHR found further that plaintiff's loan application was denied because costs exceeded defendant Bank's guidelines, which DHR concluded was a legitimate non-discriminatory business reason. Plaintiff contends that HUD and DHR failed to ensure that the investigation of the subject complaint was complete and adequate prior to issuing a no probable cause determination and closing the complaint.

On June 10, 2004, the Court dismissed all claims against the Bank except plaintiff's claim under the Fair Housing Act ("FHA"). The Court also dismissed plaintiff's claims against HUD. On September 29, 2004, the Court granted plaintiff's motion for entry of default against DHR for failure to answer or otherwise respond to the complaint.

Defendant Bank now moves for summary judgment arguing that is denial of plaintiff's loan was not based on any discrimination against her. Plaintiff also moves for summary judgment and partial summary judgment arguing that the bank's denial of her loan was pretext for illegal discrimination.

Standard for Summary Judgment

Federal Rule of Civil Procedure 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no 'genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp. v. Latrett, 477 U.S. 317, 322-23 (1986).

The movant bears the initial responsibility of asserting the basis for his motion. Celotex, 477 U.S. at 323; Apcoa, Inc. v. Fidelity National Bank, 906 F.2d 610, 611 (11th Cir. 1990). However, the movant is not required to negate his opponent's claim. The movant may discharge his burden by merely "showing - - that is, pointing out to the district court - - that there is an absence of evidence to support the non-moving party's case." Celotex, 477 U.S. at 325. After the movant has carried his burden, the non-moving party is then required to "go beyond the pleadings" and present competent evidence designating "specific facts showing that there is a genuine issue for trial." Id. at 324. While the court is to view all evidence and factual inferences in a light most favorable to the non-moving party, Samples v. City of Atlanta, 846 F.2d 1328, 1330 (11th Cir. 1988), "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original).

A fact is material when it is identified by the controlling substantive law as an essential element of the non-moving party's case. Anderson, 477 U.S. at 248. An issue is genuine when the evidence is such that a reasonable jury could return a verdict for the nonmovant. Id. The nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts...Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 474 U.S. 574, 586-87 (1986). An issue is not genuine if it s unsupported by evidence, or if it is created by evidence that is "merely colorable" or is "not significantly probative." Anderson, 477 U.S. at 249-50. Thus, to survive a motion for summary judgment, the non-moving party must come

forward with specific evidence of every element material to that party's case so as to create a genuine issue for trial.

The Rule 56 standard is not affected by the filing of cross-motions for summary judgment: The court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard." 10A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2720 at 335-36 (3d ed. 1998). Cross-motions may, however, be probative of the absence of a factual dispute where they reflect agreement by the parties as to the controlling legal theories and material facts. See United States v. Oakley, 744 F.2d 1553m 1555 (11th Cir. 1984).

Discussion

The FHA makes it unlawful for a person or entity whose business includes engaging in residential real estate-related transactions to discriminate against any person because of race when making such a transaction available or in the terms or conditions of the transaction. 42 U.S.C. § 3605(a). A "real estate-related transaction: includes the making or purchasing, constructing, improving, repairing, or maintaining a dwelling. 42 U.S.C. § 3605(b).

A claim brought under the FHA is governed by Title VII's analytical framework. See Sec'y, U.S. Dep't of Hous. and Urban Dev. v. Blackwell, 908 F.2d 864, 870 (11th Cir.1990). Under this framework, a plaintiff can prove discrimination by direct evidence or circumstantial evidence. See Damon v. Fleming Supermarkets of Florida, Inc., 196 F.3d 1354, 1359 (11th Cir. 1999). Plaintiff has presented no direct evidence of discrimination in this case, and therefore the Court will proceed under the three-step analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Under the McDonnell Douglas analysis, first the plaintiff must establish a prima facie case of discrimination. Once the plaintiff has done this, the burden then shifts to the defendant to articulate a legitimate non-discriminatory reason for its action. Once the defendant has met its burden, the plaintiff then has the burden of persuading the court that defendant's reason for its adverse action is pretext for discrimination. See Tex.Dep't of Cmty. Affairs v. Burdine, 450 U.S.248, 254 (1981).

In the credit and loan application context, to establish a prima facie case of discrimination, plaintiff must establish the following: (1) that the plaintiff is a member of a protected class; (2) that the plaintiff applied for and was qualified for a loan from the defendant; (3) that the loan was rejected despite plaintiff's qualifications; and (4) that the defendant continued to approve loans for applicants outside of the plaintiff's protected class with similar qualifications. Cooley v. Sterling Bank, F.Supp. 2d 1331, 1339 (M.D. Ala. 2003). With regard to the fourth prong, plaintiff must present evidence that she was "similarly situated in all relevant aspects" to the non-minority applicants defendant approved. Id. at 1340. A similarly situated person's and plaintiff's credit qualifications and loan details must be nearly identical and significantly parallel in every material respect. Id.

Even assuming that plaintiff has satisfied the first three elements, plaintiff has not produced evidence to show that defendant continued to approve loans for non-minority applicants with credit qualifications and loan details nearly identical and significantly parallel to plaintiff. Defendant avows that it is unaware of any other applicant whose credit qualifications and loan details are nearly identical to plaintiff's. Plaintiff states that she believes that defendant is not award of any other similarly situated applicants because

it has not proved her with information needed to make the comparison. Plaintiff's assertions are not sufficient to meet her burden. In addition, plaintiff submitted loan application information for the Buffalo, NY, area produced by defendant, but it fails to establish that certain non-minority applicants had a credit history, total assets, Beacon score, loan amount, or closing fees nearly identical to plaintiff. Cf. id. at 1341 (the plaintiff's evidence failed to establish an applicant similarly situated to the plaintiff in terms of prior credit relationship, existing lines of credit, and annual income). Thus, plaintiff has failed to establish a prima facie case of discrimination. Even assuming that plaintiff could establish a prima facie case, plaintiff's case would fail at the pretext stage of the McDonnell Douglas analysis. Defendant argues that it denied plaintiff's loan because it determined that plaintiff's closing costs on the loan would exceed 5% of the proposed loan amount, resulting in a "high cost" loan under New York law in violation of defendant's underwriting policies. Because defendant articulated a legitimate non-discriminatory reason for denying plaintiff's loan, the burden shifts back to plaintiff to offer sufficient evidence for a reasonable factfinder to conclude that this was not the real reason defendant denied the loan. Cooley, 280 F. Supp. 2d at 1342. Plaintiff argues that her loan was not a "high cost " loan because it was for rental property. She claims that defendant knew the loan was for rental property because it asked her for leas information and was award of her residence in Georgia. Also, plaintiff argues that defendant violated its policy by failing to note on her application that it had not asked for her race when completing her application. For these reasons, plaintiff argues that defendant's explanation for denying her loan is illegitimate and a pretext for discrimination.

Even if defendant denied the loan on the mistaken belief that it was for non-rental property and failed to note the lack of plaintiff's race information on her application, this does not

amount to evidence of discriminatory intent. See Cooley, 280 F.Supp.2d at 1343-44 (proving pretext requires more than showing that a bank was wrong its assessment of underlying facts or failed to follow its own internal procedures in denying a loan application). Most notably, plaintiff admits that defendant did not ask for her race or gender information and that none of the documents that defendant relied on to make the loan decision indicated her race, gender, or the racial makeup of the property's neighborhood, but instead she relied on her belief that discrimination occurred. The Court concludes that plaintiff has failed to meet her burden to produce evidence from which a reasonable jury could conclude that defendant was more likely motivated by a discriminatory intent in denying her loan application. See id at 1344.

Accordingly, defendant Bank is entitled to summary judgment. In addition, in light of the dismissal of plaintiff's claim against the Bank, plaintiff's related claim against DHR must also be dismissed.

Summary

For the foregoing reasons, the Court GRANTS defendant's motion for summary judgment [#39-1]; DENIES plaintiff's motion for summary and partial summary judgment [346-1, 346-2]; and DISMISSES this action as to all defendants.

IT IS SO ORDERED, this _____day of May, 2005

S/_____
Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS
EXEC. LAW ART. 15 SDHR NO: 7-H-RS-01-7904325-H

+----------+

(State Division of Human Rights on the Complaint of)

Boykin, Yvette I. Complainant

--Against--.

Consumer Finance Group/Bank of America Respondent

+----------+

Federal Charge No: 020105988

DETERMINATION AND ORDER AFTER INVESTIGATON

On September 17, 2001, Boykin, Yvette I. Filed a verified complaint with the State Division of Human Rights charging the above-named respondent with an unlawful discriminatory practice relating to Housing because of Race/Color and Sec in violation of the Human Rights Law of the State of New York.

After investigation, and following review of related information and evidence with named parties, the Division of Human Rights has determined that, insofar as respondent Consumer Finance Group/Bank of America is concerned, there is NO PROBABLE CAUSE to believe that the said respondent has engaged in or is engaging in the unlawful discriminatory practice complained of. This determination is based on the following:

Determination: NPC NON-TITLE VII AND NON-ADA and NON-ADEA (DET.18 - 08/92) IBM/IBM 11/29/01

APPENDIX C

SDHR NO: 7-H-RS-01-7904325-H
FEDERAL CHARGE NO: 020105988

The investigation did not reveal any evidence to suggest Complainant had been discriminated against. Complainant's loan application was declined as costs exceeded Respondent's guidelines, a legitimate non-discriminatory business reason.

The complaint is therefore ordered dismissed and the file is closed.

Any party to the proceeding may appeal this Determination to the New York State Supreme Court in the County wherein the alleged unlawful discriminatory practice took place by filing directly with such court a notice of Petition and Petition within sixty (60) days after service of this Determination. A copy of this Petition and Notice of the Petition must also be served on all parties including General Counsel, State Division of Human Rights, One Fordham Plaza, Bronx, NY 10458. DO NOT FILE THE ORIGINAL PETITION AND NOTICE OF PETITION WITH THE STATE DIVISON OF HUMAN RIGHTS.

PLEASE TAKE FURTHER NOTICE that a complainant who seeks state judicial review and who receives an adverse decision therein, may lose his or her right to proceed subsequently in federal court by virtue of Kremer vs. Chemical Construction Co., 456 U.S. 461 (1982)

DATED AND MAILED: DEC 03 2001

STATE DIVISION OF HUMAN RIGHTS

By s/ _____
William P. Marks
Regional Director

(2)

No. 05-1211

FILED
MAY 2 2 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

YVETTE BOYKIN,

Petitioner,

v.

BANK OF AMERICA CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where Petitioner has failed to show that the Eleventh Circuit's Opinion affirming the District Court's application of the *McDonnell-Douglas* analytical framework conflicts with a decision of any Court of Appeals.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where Petitioner has failed to show that the Eleventh Circuit's Opinion affirming the District Court's application of the *McDonnell-Douglas* analytical framework conflicts with a decision of this Court.

III. Whether Petitioner has presented compelling reasons to grant the Petition, where Petitioner has failed to show that the Eleventh Circuit's Opinion affirming the District Court's application of the *McDonnell-Douglas* analytical framework implicates a federal question that has not been, but should be, decided by this Court or otherwise merits the Court's attention.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Bank of America Corporation, a publicly traded holding company, does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

Respondent EquiCredit Corporation of America is a wholly-owned subsidiary of Bank of America, N.A.

Respondent Bank of America, N.A. is a wholly-owned subsidiary of NB Holding Corporation, which is a wholly-owned subsidiary of Bank of America Corporation, a publicly traded company.

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INTRODUCTION

Petitioner has presented no "compelling reasons" for her Petition for a Writ of Certiorari to be granted (the "Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate that the Eleventh Circuit's December 21, 2005 Opinion (the "Opinion") is in conflict with a decision of another Court of Appeals or of this Court, or that the Eleventh Circuit decided an important federal question that has not been, but should be, settled by this Court. *See* Sup. Ct. R. 10(a)-(c). Therefore, the Petition should be denied.

The Eleventh Circuit determined that Petitioner failed to establish a prima facie case of housing discrimination. The Eleventh Circuit further determined that, even if Petitioner could establish a prima facie case, her discrimination claim would fail because EquiCredit Corporation of America, a wholly-owned subsidiary of Bank of America, N.A. ("EquiCredit") had proffered a legitimate, nondiscriminatory reason for denying Petitioner's loan and she had failed to show that EquiCredit's reason was merely a pretext for discrimination.

The gravamen of the certiorari request is Petitioner's simple desire to have a third review of her claims, which lack any substantiating evidence. Rather than presenting a conflict regarding appropriate legal standards, this case presents a fundamental failure of factual proof by the Petitioner.

Petitioner's speculation that the Eleventh Circuit's Opinion creates a Circuit split because of its use of the fourth element of analysis developed by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for establishing

a prima facie case of discrimination lacks credible support. (*See* Pet. at 6.) Petitioner's Circuit split theory relies almost exclusively on two district court cases which have been discredited by a sister district court for applying a theory that "has not been used anywhere besides the Northern District of Ohio." *Latimore v. Citibank*, 979 F. Supp. 662, 667 (N.D. Ill. 1997), *aff'd*, 151 F.3d 712 (7th Cir. 1998). Simply put, there is no Circuit split on this issue.

Petitioner's argument that the Eleventh Circuit's Opinion conflicts with decisions of this Court in substance is no more than an improper request for this Court to reconsider and reevaluate the "evidence" she presented below. In alleging that the decisions below conflict with a decision of this Court as to the parties' burdens, Petitioner does not claim that the courts below applied the wrong standard for the parties' burdens but instead disputes how they analyzed her claims, and her lack of any supporting evidence.

Petitioner's argument that the Eleventh Circuit's Opinion presents an issue of national importance has no record support. Petitioner failed to present any evidence that race was a motivating factor in the decision to deny her loan application. While the *McDonnell Douglas* burden-shifting framework eases the burden of production for a plaintiff in a discrimination case, it never eases a plaintiff's burden of persuasion. Petitioner lacked evidence to support her discrimination allegations. Petitioner has raised no new issues that extend beyond the scope of her case, and this Court, as acknowledged by and relied upon by Petitioner in her other arguments, already has provided consistent guidance in the application of the controlling law to similar cases.

Simply put, Petitioner has failed to carry her burden of demonstrating that there are any compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

I. Factual Background

A. Petitioner Has Failed to Present Any Evidence to Support Her Claim of Discrimination.

The undisputed, material facts of the evidentiary record in this case are that (i) EquiCredit did not know Petitioner's race, sex, or the racial demographics of the neighborhood surrounding the property at issue when it denied her loan application (Doc. 44 (Deposition of Yvette Boykin ("Boykin Depo.")) at 22, 26-27, 30-32, 63; R2-41 (Declaration of Andy Della-Loggia ("Della-Loggia Dec.")) -3 (&4) (¶¶ 6-7); R3-51 (Stmt. Mat. Facts) -2 (¶¶ 16-18); R3-49 (Response Br.) -3 (&4)); and (ii) EquiCredit's decision to deny Petitioner's loan application was based solely on EquiCredit's interpretation of New York Banking Department Regulations and EquiCredit's belief that the amount of closing costs in relation to the amount of Petitioner's proposed loan would result in a "high-cost loan" under New York law in violation of EquiCredit's loan underwriting policies. (R2-41 (Della-Loggia Dec.) -5 (&6) (¶¶ 8-10) and Exhs. A and B; R1-1 (Compl.) -4 (¶¶ 9-10); Doc 44 (Boykin Depo.) -Pgs 34, 35-36, 74-75; R3-51 (Stmt. Mat. Facts) -2 (&4) (¶¶ 21-25, 33-34).)

Furthermore, EquiCredit did not apply the New York banking regulations differently to similarly-situated applicants